SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1968

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No. 1344

WILLIAM PAUL PLUMLEY,
Petitioner,

v.

THE STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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Petitioner, William Paul Plumley prays that a writ of certiorari issue to review an opinion and order of the Court of Special Appeals of Maryland affirming his conviction of attempted murder. The Opinion and Order of the Court of Special Appeals was entered in the above captioned case on August 13, 1968. Petitioner applied for a Writ of Certiorari to the Court of Special Appeals, in the Court of Appeals of Maryland on October 7, 1968, but this petition was denied on February 4, 1969.

OPINIONS BELOW

The opinion of the Court of Special Appeals (App. 1-14) is reported at 4 Md. App. 671, 245 A2 111 (1968). The Order of the Court of Appeals denying certiorari to the Court of Specials Appeals (App. 13) is an unreported order.

JURISDICTION

The decision of the Court of Special Appeals of the State of Maryland was entered on August 13, 1968. The Order of the Court of Appeals of the State of Maryland, denying Petition's Petition for Writ of Certiorari to the Court of Special Appeals was entered on the 4th day of February, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the giving of an expended, coercive "Allen Charge" under the circumstances of this case, denied the Petitioner a right to a fair trial and substantive due process under the Fifth, Sixth and Fourteenth Amendments.

2. Whether *Allen v. United States*, 164 U.S. 492 ought to be overruled or modified.

3. Whether the failure of a trial court to instruct a jury as to the meaning of the term "reasonable doubt" in a criminal case, upon specific request of defense counsel, deprives the Petitioner of substantive due process under the Fifth and Fourteenth Amendments.

STATEMENT

Petitioner was convicted of attempted murder by a jury in the Circuit Court for Prince George's County, Maryland on March 21, 1966 upon circumstantial evidence that showed that he had placed a homemade bomb in the automobile of one John P. Scott. The facts of the case are

set out in the opinion of the Court of Special Appeals (App. 1-14), and show sufficient circumstantial evidence from which the jury could have returned a verdict of innocent as well as of guilty.

Petitioner's trial was held on March 16th, 17th, 18th and 21st, 1966, and after instructions to the jury, and argument of counsel, the jury retired to its deliberations at 4:30 p.m. on March 21st. Approximately seven hours later, at 11:38 p.m., the trial judge, *sua sponte*, announced his intention of recalling the jury and administering the so called "Allen Charge," notwithstanding the fact that the jury had not reported an impassee in its deliberations. (App. C-7.) Petitioner's counsel below objected to the giving of the charge and noted the late hour. (App. C-8.) After recalling the jury the trial judge learned from the jury's Foreman that the jury was in fact "making progress," but still proceeded to give an embellished, and coercive "Allen Charge." (App. C-7, 8.)

One hour and fifteen minutes later the jury returned with a verdict of guilty (App. C-8.)

Petitioner filed a Notice of Appeal to the Court of Special Appeals on the day of his sentencing, May 2, 1966, where he received a sentence of fifteen (15) years incarceration in the Maryland Penitentiary. (App. A-1.) The Court of Special Appeals affirmed Petitioner's "belated appeal" on August 13, 1968, and on October 7, 1968, Petitioner applied in the Court of Appeals of Maryland for a writ of certiorari to the Court of Special Appeals, but this writ was denied on February 4, 1969.

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[1]Petitioner's original appeal was dismissed pursuant to Maryland Rule 1035b4, on August 31, 1967, for failure to file his initial brief on time. On September 27, 1967 the Circuit Court for Prince George's County, Maryland granted a "belated appeal" under Post Conviction Procedure laws, Article 27, Sec. 645A, Annotated Code of Maryland, page 411. It is from this belated appeal that Petitioner seeks review.

(App. B-1.) The Court of Appeals of Maryland is the court of last resort in a criminal case, and review of a criminal case may be obtained by writ of certiorari, Article 5, Sec. 21A, Annotated Code of Maryland, page 138. Article IV, Secs. 14A, 14B, 15, 16 and 18, Constitution of Maryland, page 56. (App. E-1; F-14).

Petitioner's objection to the giving of the "Allen Charge" was preserved in the trial court, by objection to the proposed instruction before it was given (App. C-7), and this point was presented on Appeal to the Court of Special Appeals which decided the point against Petitioner (App. A-10-13). Petitioner's Petition for Writ of Certiorari to the Court of Special Appeals briefed this point but the Petition was denied by the Court of Appeals (App. B-1). Petitioner is presently free on bond in the amount of fifteen thousand dollars ($15,000.00) pending determination of this petition.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case for three reasons: First, the decision below represents an unwarranted extension of *Allen v. United States*, by the application of certain coercive remarks prior to the actual giving of the Allen Charge; Second, this Court has never sanctioned the giving of the Allen Charge in every case that the jury fails to return a verdict in a few hours, and the fact that this particular jury reported that it was making progress in its deliberations, even after seven (7) hours, compells the Court to carefully define the conditions and circumstances under which the Allen Charge may be given, so that there is no overreaching by trial judges on the inherent function of the jury's deliberations; Third, seventy-three (73) years have passed since the Court approved the "Allen Charge," but to this date no guidelines have been established as to the proper circumstances under which the charge should be given. The issue of the failure of the trial court to instruct the jury as to

the meaning of the term "reasonable doubt," upon request of defense counsel (App. C-5), is so basic a proposition to criminal law, that a conviction based on circumstantial evidence, without a definition of "reasonable doubt" is a legal nullity.

The charge of the Court shown in the transcript indicates conclusively that the Trial Court did not even give the rudimentary fundamental definition to the jury of what reasonable doubt was or is. This is critical in a case of this nature where the entire case is based on circumstantial evidence and a jury is subjected to such intensive coercion as is found in the so-called "Allen Charge" and other circumstances occurring at trial.

The Trial Court had this matter brought to its attention and still did not charge on the definition of reasonable doubt. (App. C-5, 6.)

This is error, for no reviewing court could say, beyond a reasonable doubt, that the failure to instruct a jury as to the definition of reasonable doubt could be totally free of error. *Chapman v. California*, 386 U.S. 18 (1967), teaches that the appellate court must be satisified beyond a reasonable doubt that the error claimed below did not have some effect on the findings.

Under the circumstances of this case, where there was a coerced verdict, no appellate court could have that view in the circumstances here presented.

The Appellant's point is demonstrated most aptly by *Bishop v. State*, 287 SW 2d 49 (Tenn. 1956), wherein the Court held that failure to charge on reasonable doubt, constitutes, in and of itself, reversible error. This, of course, is now stronger in view of the doctrine of *Chapman v. California, op. cit.*

THE SO-CALLED "ALLEN CHARGE" GIVEN WAS ERRONEOUS AND IMPERMISSIBLE UNDER THE CIRCUMSTANCES FOR THE FOLLOWING REASONS:

The charge, as given, was an incorrect statement of law and coercive on the jury in violation of the Appellant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

The jury in this case, after seven (7) hours of deliberation, with an empty stomach and late at night, was told by the Trial Court, in no uncertain terms, that the case was one that had to be decided; and if it could not be decided by this jury, then another jury was going to have to decide the matter.

The jury was also told that the minority members should listen to the arguments of the majority and the minority members should consider whether their views were correct. In no way, shape or form were the majority members told to listen to the arguments of the minority members, nor, indeed, was the jury told that they had a right to disagree if they saw fit. (App. C-8.)

The Fifth and Sixth Amendments guarantee every person charged with an indictable crime the right of due process of law and trial by a fair and impartial jury. Implicit in these guarantees is the right of an individual defendant to have a jury disagree.[2] The Allen Charge infringes upon this right, as its very purpose is to facilitate agreement among jurors. *Green v. United States*, 309 F. 2d 852, 854 (C.A. 5, 1962); *Campbell v. United States*, 115 U.S. App. D.C. 30, 316 F. 2d 681, fn. 1. It is based on a fallacious legal principle that some jury at some time should convict or acquit. Thus, the Allen Charge is in direct conflict with an individual's fundamental constitutional guarantees.

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[2]See: Federal Rules of Criminal Procedure, 28 U.S.C., Rule 31 (a) "*Return*. The verdict shall be unanimous. * * *" See also: *Andres v. United States*, 333 U.S. 740.

In *Allen v. United States*, 164 U.S. 492, the Court sustained a long-established practice[3] and laid down the following guidelines for a supplemental charge to be given to a deadlocked jury (164 U.S. at 501):

> "* * * that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. * * *"

Certainly the purpose behind the Allen Charge is an advantage to both sides as it saves the time and expense of numerous trials. However, this is a legitimate or proper purpose only if the change in the minority jurors' opinion is due to a reasoned change in their views of the evidence. But, despite the good intentions behind the Allen Charge, the great danger with it is that the effect it has on the jury cannot be ascertained. And, since it is always directed to the minority, it may cause the minority jurors to substitute the view of the majority for their own. If this is done, of course, the verdict is improper and violates the

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[3]Cf. *Commonwealth v. Tuey*, 62 Mass. (8 Cush.) 1 (1851); *Allis v. United States*, 155 U.S. 117.

defendant's constitutional rights because the jury has not reached a unanimous verdict but only a majority verdict. Experience has established that even if the Allen Charge has served its avowed purpose of saving the time and expense of new trials, the decision has resulted in the erosion of individual constitutional rights of defendants due to its very nature of coercion. That this is true is perhaps best shown by considering decisions of the lower courts which have had occasion to consider, criticize and limit equivalent charges.[4]

The Federal courts, while duty bound to uphold the Allen Charge, have shown this apprehension of it by reversing convictions where the supplemental instructions varied, even in the slightest, from it. For example, in *Green v. United States, supra,* the Court held that a charge containing the statement that "the majority will have better judgment than the mere minority" far exceeded "the permissible limits of the Allen Charge" (309 F. 2d at 855). The Court pointed out that there is no legal rule that the majority should distrust their judgment and that such a charge leads the minority to believe that they should accede to the majority for no other reason than that. This, the Court said, disregards the historical rule that a single juror has a right to stick to his conscientious opinions.

Likewise, in *Rogers v. United States*, 289 F. 2d 433 (C.A. 4, 1961), a conviction was reversed because the trial judge gave an Allen-type charge but failed to include the ameliorating admonition that no juror should yield his conscientious conviction. The Fourth Circuit stated that the Allen Charge, itself, "approaches the ultimate permissible limits" (289 F. 2d at 435). That same Court

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[4]See: "Deadlocked Juries and Dynamite: A Critical Look at the 'Allen Charge'" U. Chi. Law Rev. 31:386 (1964); and "Instructions by Trial Court coercing Agreement Among Jurors," Tulane Law Rev. 34:214 (1951).

again reversed a conviction, in *United States v. Smith*, 303 F. 2d 341 (C.A. 4, 1962), where the ameliorating admonition was given, but after the statement that the minority should "swallow their views and attempt to agree with the majority" (303 F. 2d at 343). The Fourth Circuit reiterated that, "(u)naccented and unembellished, the Allen Charge is quite bold enough" (303 F. 2d at 343).

And, in *Powell v. United States*, 297 F. 2d 318 (C.A. 5, 1961), a conviction was reversed because the trial judge embellished on the Allen Charge with such phrases as "this jury is just as competent as the next jury"; "no credit will be due a juror who stands up in a spirit of pure stubborness"; and, "this jury ought to be able to reach a verdict in this case." The Fifth Circuit found no authority for the trial court to go beyond the wording set forth in the *Allen* case. The Court felt that because the trial judge had done so, the jurors might have been induced to agree to a verdict by fear that a failure to do so would reflect upon their intelligence or integrity.

However, in *Huffman v. United States*, 297 F. 2d 754 (C.A. 5, 1962), *cert. denied*, 370 U.S. 955, decided approximately a year after *Powell*, the Court affirmed, even though the trial judge embellished on the Allen Charge. A comparison of the charges in the two cases shows that the embellishment in *Huffman was far greater than in Powell*.[5] The courts have not been consistent in their approach to this problem. Indeed, Judge Brown, dissenting in *Huffman*, agreed that the courts ought to, at least, attempt to be consistently fair.

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[5]The dissenting opinion in *Huffman* points out the manifest unfairness of the decision as compared to *Powell*. Judge Brown states that the only reason that reversal was not granted in *Huffman* was that no objection was made to the Allen Charge, as was the case in *Powell*. Petitioner submits that, if *Allen* constitutes the constitutionally permissible limits, no failure to object can waive the violation of due process.

Judge Brown went beyond pointing out that unfairness arises due to confusion between the decisions because of the necessity of applying the law to the facts in each case. He argued that the Allen Charge is *per se* unfair and should no longer be used. His rationale as to why the charge in *Huffman* was erroneous is applicable here.

The dissent in *Huffman* points out that the charge was based upon a basic misapprehension that criminal cases must end with a verdict of guilty or not guilty; overlooking the fact that a jury's failure to agree is a momentary victory, at least, for the defense, and an end to the trial; and, that once the charge is given the jury was no longer free but was influenced by the judge's statement that it was their duty as citizens and jurors to agree. Judge Brown states (297 F. 2d at 759):

> "* * * There is no longer any place for the Allen Charge. For good reason, it has acquired its description as the 'dynamite charge' (Variously called the nitroglycerine charge) at the hands of the bar. * * * I think a mistrial from a hung jury is a safeguard to liberty."

In *Andrews v. United States*, 389 F. 2d 127 (C.A. 5, 1962), a further refinement was made. There, the question was whether the trial judge gave the Allen Charge too quickly—one hour and five minutes after the jury had begun deliberations; the Court upheld the conviction. Judge Wisdom's dissenting opinion declared that the Allen Charge causes "more trouble than worth" (309 F. 2d at 129). The nature of the confusion that has arisen in this area is well shown by *Green v. United States, supra*. In *Andrews*, the trial judge had informed the jury before retiring to render its verdict, that the minority should listen to the majority and should view its opinion with some doubt. The Fifth Circuit, after deciding that the sole purpose of the Allen Charge is to "blast loose a deadlocked jury" (309 F. 2d at 854) stated that: "(t)here is small, if any, justification for its use and no justification

for its coercive use" (309 F. 2d at 854).[6] The Constitutional guarantees of due process and a fair and impartial jury cannot be circumscribed by creating a new right of courts to "blast loose" a jury that has disagreed.

In *Peterson v. United States*, 213 Fed. 920 (C.A. 9, 1914), a conviction was reversed where the trial judge, in a supplemental instruction, placed too much emphasis on the cost of trial (the case had been tried twice), and informed the jury that justice required the case to be brought to an end. The Court of Appeals said that the language used "is plainly coercive in its general spirit and tendency" (213 Fed. at 924).

State courts have also wrestled with the question whether the Allen Charge—or similar language—is coercive on its face. And few States have found such charges totally wanting.

In *State v. Thomas*, 86 Ariz. 161, 342 P. 2d 197, the Supreme Court of Arizona considered language almost identical to that in *Allen* and a problem identical to the one now before this Court, and said (342 P. 2d at 200):[7]

> "This instruction has been before us four times. When and wherever its use is called into question it must stand or fall upon the facts and circumstances of each particular case. It has given, and we believe each use will give us, harassment and distress in the administration of justice. No rule or thumb can circumscribe definite bounds of when and where, or under what circumstances it should be given or refused.

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[6] In *United States v. Kahaner*, 317 F. 2d 459 (C.A. 2, 1963), *cert. denied*. 375 U.S. 836, 926, that Circuit recognized its disagreement with the Fifth Circuit's application of the Allen Charge. See fn. 18, 317 F. 2d 484. In *Kahaner*, a conviction was upheld after the *Allen* charge was given a second time at the request of the jury.

[7] See and compare: *State v. Evans*, 68 Ariz. 364, 356 P. 2d 1106, *cert. denied*, 371 U.S. 835.

"It now appears that its continued use will result in an endless chain of decisions, each link thereof tempered and forged with various facts and circumstances and welded with ever-changing personalities of the appellate court. This is not in keeping with sound justice and the preservation of human liberties and security. We are convinced that the evils far out-weigh the benefits, and decree that its use shall no longer be tolerated and approved by this court."

The *Thomas* case overruled *State v. Voeckell*, 69 Ariz. 145, 210 P. 2d 972, where the Arizona Supreme Court permitted an Allen-type charge. The dissenting opinion of Justice Udall in the *Voeckell* case was impressive and undoubtedly influenced the later result in *Thomas*. He said (210 P. 2d at 978, 979):

"* * * Inasmuch, however, as it is a matter of first impression in this jurisdiction I strongly feel that the Court, at this crossroad, has taken the wrong path, and that the approval of its use now and in the future is a step backward rather than forward in the fair and impartial administration of justice.

"I agree with defense counsel that after hearing this instruction each minority juror no doubt reasoned thusly to himself: 'The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did not tell me to doubt *seriously* the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will have to change my vote.' (Emphasis supplied.)

"In my opinion the giving of the instruction complained of unfairly tipped the scales of justice against this defendant as it had a highly coercive effect upon the jury. Furthermore, I am convinced that if this

instruction under similar circumstance comes into general use in the trial courts of this state it will more frequently than not result in miscarriages of justice.

"The courts are ever alert to curb 'third degree' methods by peace officers against those accused of crime, hence it becomes all the more necessary that the trial court itself refrain from any act, such as the giving of last minute 'advice' that in Colorado at least has earned the subriquet of 'third degree instruction.' The Supreme Court of Michigan in speaking of acts of jury coercion made the sage statement: 'Every attempt to drive men into agreement which they would not have reached freely is a perversion of justice.' " *Pierce v. Pierce*, 38 Mich. 412.

And, in *Eikmeier v. Bennett*, 143 Kan. 888, 57 P. 2d 87, 92,[8] the Kansas Supreme Court said:

"* * * To say to a minority that they should re-examine their views in the light of the opinion held by the majority, without *putting a like duty on the majority* * * * is wrong. The minority may be right and the majority wrong. Until the legislature provides for verdicts by definite majority of the jury, the court, by additional instruction, should not suggest, even faintly, that the opinion of the minority is to be controlled by that of the majority." (57 P. 2d at 92.) (Emphasis supplied.)

Courts in other states, while not wholly rejecting the Allen Charge, have treated it unkindly. In Colorado it is called the "third-degree instruction," *Leech v. People*, 112

[8]See annotation in 19 A.L.R. 2d 1257, 1258, "* * * the principles or considerations governing the propriety of verdict-urging instructions in civil cases appear to be essentially the same as they are with respect to criminal trials, the court having rarely, if ever, suggested any considerations as clearly differentiating the two kinds of trials in this respect."

Colo. 120, 146 P. 2d 346; in New Mexico, the "shot-gun instruction," *State v. Nelson*, 63 N. Mex. 428, 328 P. 2d 202. Further, the courts in Idaho, Iowa and Wisconsin have discouraged the use of the charge. *State v. Moon*, 20 Idaho 202, 117 P. 2d 757; *State v. Pierce*, 178 Iowa 417, 159 N.W. 1050; *Middlestate Utility Company v. Incorporated Telephone Company*, 222 Iowa 1275, 271 N.W. 180; *Hannon v. State*, 70 Wis. 448, 36 N.W. 1; *Hodges v. O'Brien*, 113 Wis. 27, 88 N.W. 901; *Secor v. State*, 118 Wis. 621, 95 N.W. 942; *Brown v. State*, 127 Wis. 193, 201, 106 N.W. 536, 539.

In *State v. Pierce, supra*, an otherwise properly given Allen-type charge brought about a reversal because the jury reacted too quickly to it. The Supreme Court of Iowa was concerned that the charge might have incorrectly influenced the jury. In reversing, the Court said (159 N.W. at 1055):

> "The rule above-stated shows on its face how difficult it is to apply it with safety to the rights of the parties. That is the one which our holdings compel does not obviate its dangers. Therefore, though its wording is technically correct and has often been approved, it will be better not to give it unless it be in an extreme case, and we suggest that where given it be in language less likely to have a coercive affect upon the mind of the average juror."

In *Counts v. Commonwealth*, 137 Va. 744, 119 S.E. 79, the Supreme Court of Virginia found that the trial court's statement to the jury that the minority should attempt to reconcile their views with the majority was coercive and reversed.

State v. Fisher, 23 Mont. 540, 59 Pac. 919, involved a reversal of a conviction on the ground that the trial judge, in his supplemental charge, said: "Feeling as I do about the case I see no reason for the jury to disagree and put the county to a large expense." See also: *Orr v. State*, 269

Ala. 696, 111 So. 2d 627; *Meadows v. State*, 182 Ala. 51, 62 So. 737; *Secor v. State, supra; McCarthy v. Odell*, 202 App. Div. 784, 195 N.Y.S. 80.

At the other extreme, one finds cases such as *Chase v. State*,_____ Alaska _____, 369, P. 2d 997, where the Alaska Supreme Court upheld a conviction in a case where the Allen Charge was given after the trial judge had determined that the jury was voting for conviction eleven to one. Compare *Burton v. United States*, 196 U.S. 283; *Brasfield v. United States*, 272 U.S. 448, where the identical practice was condemned.

That the courts, both State and Federal, have been concerned with whether an Allen-type instruction causes a juror to give up his belief to that of the majority solely for the purpose of reaching an agreement, is made obvious by reading the foregoing cases. A slight change of language, a slight difference in the time the charge was given, or a combination of slight changes of both, have all caused errors requiring reversal.

The disrepute in which the Allen Charge has come to be held can be seen in its popular designation as the "dynamite charge." Perhaps this is due in part to the fact that the charge is given for the purpose *of expediency*. The rationale as to why the very purpose of the Allen Charge is contrary to constitutional rights and is *per se* coercive and improper was set forth by Judge Brown in his dissent in *Huffman v. United States, supra*, as follows, and appears to best express the body of judicial thinking in this area:

> "In the final analysis the Allen Charge does not make sense. All it may rightfully say is that there is a duty to accept the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to decide, it is

legally incorrect and an interference with that rightful independence.

"The time has come I think to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great." (297 F. 2d at 759.)

It can be seen by an analysis of the case law and the charge given in the Court below that the Allen Charge, as given by Judge Parker, under the circumstances here, at a late hour, in a case involving circumstantial evidence, when jurors were hungry and tired, when the jury was not even instructed that the charge was advisory or that they had a right to disagree; that each and every legal precedent has been broken.

The Appellant invites the Court's attention to the fact that the Circuit Court of Prince George's County told the jury that the case was going to have to be decided by someone, this is plainly contrary to fact, truth and law, for a jury in Maryland has a constitutional right to disagree.

In addition, the Court went on to tell the minority members of the jury that they must listen to the majority but not vice versa.

Under the circumstances here presented by this particular record, this Court should allow the Appellant to fully brief and present this matter, as it presents a serious and appropriate recurring question in the proper administration of criminal law in this State.

Again, the charge, as given the Trial Court, must be analyzed within the context of *Chapman v. California, op. cit.*, and the reviewing court must hold, as a matter of law, that they could have no reasonable doubt that the charge, under the circumstances which it was given, was coercive. This, we submit, no court could do. This Court must note that the jurors in this action were held, apparently, without food, meat or drink, as the Bailiff's

oath requires, from the luncheon recess until they were forced to bring in a verdict at 1:00 o'clock the next morning. This is shocking and is coercive where the evidence in a case such as this is so plainly in doubt.

The decision of the Court of Special Appeals is but one of a number of State and Federal court decisions that have attempted an *ad hoc* approach to each Allen Charge case. The decisions are neither uniform in result nor in the application of the seventy-three (73) year old Supreme Court determination. This case presents a signal and significant opportunity for expunging or carefully defining the application of the Allen Charge.

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

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Appendix A

OPINION AND ORDER OF THE
COURT OF SPECIAL APPEALS
OF MARYLAND

IN THE

Court of Appeals of Maryland

No. 251

WILLIAM PAUL PLUMLEY,

v.

STATE OF MARYLAND

OPINION

MORTON, Judge.

The appellant was found guilty by a jury in the Circuit Court for Prince George's County of an attempt to murder John Preston Scott and was sentenced to imprisonment for a term of 15 years.

At the trial Scott testified that he owned and operated an "all night" restaurant known as the Branch Avenue Coffee Shop and that the appellant had worked for him and lived in the residence occupied by Scott and his wife. He discharged the appellant two or three days before 22 December 1965 "for not doing his work properly and

taking money from the pool tables."[1] In the early morning hours of 22 December Scott was at his home and saw the appellant drive past the house on two occasions in a maroon and cream colored Ford. Shortly thereafter Scott drove a Cadillac car, owned by his brother-in-law, which car the appellant knew that Scott used, to the restaurant and parked it in back of the building. At 4:00 A.M. Scott saw the Ford at the restaurant. About noon Scott attempted to leave the restaurant but the Cadillac would not start. He thought the car was out of gas and sent a boy to get some. When the boy returned with the gas he opened the hood to pour some in the carburetor and observed a "ball of wire taped up" and "wires leading from this wire down to a pipe, down by the steering mechanism and another wire was run over and was tied to a bolt on the car water pump." He told the boy who had gotten the gas that he thought it was a bomb and to stay away from it, called the police, and told people in the restaurant that there was a bomb in the car. The appellant came into the restaurant about an hour later and Scott said that when the appellant saw him he "was real nervous and real white" and "was shaken and had a real scared look on his face." This impression of the appellant's reactions was corroborated by other witnesses. There was testimony by a sergeant of the U.S. Army Explosive Ordnance Disposal Group, qualified as an explosive expert, that he dismantled the bomb and that had it exploded the driver of the car would have been killed. Police officers testified that the pipe comprising the bomb was a two-inch pipe coupling which had a notation "1.05" on it. Seventy-five hardware stores in the area were checked and

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[1] On cross-examination Scott admitted that he "had heard rumors" that the appellant had "put the finger" on him, informing the police of certain alleged activities, leading to charges and subsequent convictions of receiving stolen property and illegal possession of slot machines. See Scott v. State, 1 Md.App. 481, 231 A.2d 728.

at all of them the price of a similar coupling was ninety cents except at Candey's Hardware Store where it was $1.05. The manager of Candey's testified that a paint shaking machine at his store occasionally spattered paint into the bin containing such couplings, that the appellant had been a customer in the store and that the pipe found in the car was similar to those sold in his store. The police obtained several price tags from the bins which were spattered with paint. The police also found two rolls of wire at the Shanty Restaurant. F.B.I. experts testified that the wire in the bomb came from one of these rolls of wire, that paint particles found on the pipe portion of the bomb matched the paint particles on the price tags and that the powder used in the bomb was Hercules Bullseye Smokeless powder. The manager of a store called the Gun Hospital testified that on 17 December the applellant had purchased two cans of Bullseye gun powder and a can of Unique gun powder. Two electricians testified that about 18 December the appellant asked them where he could get a dynamite cap. Another witness testified that on a number of occasions the appellant had said he wanted to kill Scott, that he had to kill Scott and had asked for some poison. The appellant finally asked if the witness knew where he could get a dynamite cap. A cab driver testified that he had picked the appellant up about 2:30 P.M. on 21 December and driven him to a rural, wooded area on Tucker Road where the appellant went into the woods and returned with a long, thin bag containing a square object. He then drove him to the Shanty Restaurant and the appellant requested that the driver now show the Tucker Road stop on his manifest. The owner of the Shanty Restaurant saw the appellant standing in front of the restaurant on 21 December about 5:30 P.M. The appellant had a long, thin package, about 4 inches thick and 2 feet long. He drove the appellant to Branch Avenue Coffee Shop and saw the appellant place the package against the back of the shop under a box. A waitress at the coffee shop testified that the appellant had

shown affection for Scott's wife. Another waitress at the shop said that the appellant told her that he loved Scott's wife and would go so far as to kill for her. Both testified that about 5 December the appellant had taken a shotgun shell from his pocket, poured out the powder and ignited it saying that a little bit would not hurt anyone but enough of it would blow somebody sky high. Scott testified that several months previously the appellant told him he could make a bomb out of shotgun shells, a pipe and caps. Another witness said that the appellant told him that if he could get some medicine that would kill a man it would be worth some money.

The appellant, testifying on his own behalf, denied any relationship with Mrs. Scott, denied purchasing gun powder at the Gun Hospital, alleging he purchased shotgun shells, denied driving by Scott's home in the early morning of 22 December, denied purchasing the pipe and denied any conversations about killing Scott. He admitted working at the Shanty Restaurant, admitted driving a maroon and cream colored Ford on 21 and 22 December, admitted that he was an automobile mechanic and admitted that he had rather extensive training in making bombs. He said that if he had put the bomb in the car it "would have went off."

I

The State in its opening statement said: "The Defendant, we will then show, was questioned on or about 27 December before Sheriff Jamieson and Detective Sergeant Husk, at which time he indicated that he did in fact know how to make a bomb * * *." At this point, out of the presence of the jury, defense counsel objected, arguing that the State could not "go into any statement this Defendant made at this time" asking, "what if it is not admissible?" The State said it would prove the statement was voluntarily made, and the court said that it would

"deal with it at that time." Defense counsel asked if the court would "then consider (the remarks) improper"—in the event the admission was ruled inadmissible, "would the court grant a mistrial?" and the court said, "We will have to face it at that time."

On the fourth day on the trial the State called the Sheriff in rebuttal and during his testimony he said that he "conversed" with the appellant on 27 December in the interrogation room at the police station. "The conversation dealt with the construction of a bomb and Mr. Plumley, as I recall, drew us a diagram as to the construction of one * * * [H]e told us how one could be made, and indicated that he had the knowledge and ability to build one." That testimony came into evidence without objection.

[1-3] The appellant contends on appeal that the lower court erred in allowing this testimony in evidence. He concedes that the statements now challenged were not a confession but alleges that they were admissions and urges that they fell "within the doctrines" of Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694. While it is correct that *Miranda* prohibits the admission of statements by an accused made during a custodial interrogation, be they inculpatory or exculpatory, in the absence of observance of the procedural safeguards enunciated, *Miranda* is not applicable as the appellant's trial commenced before 13 June 1966. Crumb v. State, 1 Md.App. 98, 227 A.2d 369. Therefore, they were properly admissible if they were voluntarily made. For while an admission which is significantly incriminating but short of a confession, must, like a confession, have been made voluntarily and without improper inducement to be evidence against the accused, the requirement on the State to show preliminarily to the judge, before its admission, that a confession is voluntary—unless the fact is conceded—does not apply to an admission. Stewart v.

State, 232 Md. 318, 323-324, 193 A.2d 40.[2] Here the admissions came into evidence without objection and there was no allegation below or on appeal that they were the product of force, violence, threats, inducements or promises. Since the appellant did not object to the introduction below on the ground that the admissions were involuntarily made, the question is not properly before us. Md. Rules, 1085; Gaudio and Bucci v. State, 1 Md.App. 455, 463, 230 A.2d 700. We do not agree that the colloquy between the court and defense counsel (not the same counsel as counsel on appeal) was sufficient to preserve the question. As to the contention that the court should have granted a mistrial, no motion for a mistrial was made at the time of the opening statement by the State (we think it clear that at that time counsel merely inquired of the court if it would grant a mistrial if the admissions were not admitted) nor thereafter (the admissions were admitted without objection). In the absence of a ruling by the court, there is nothing for us to review.

II and III

[4] Doris Thompson, a waitress at the coffee shop, had given the State a statement in which she said that the day after the appellant was fired she had asked him if he had any idea of killing Scott or of getting someone to do it. The appellant told her he was not going to hurt Scott "but that it would all be over in a certain number of hours or by Monday night." At the trial the State called her as its witness and asked if she has a conversation with

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[2]Prior to the testimony now challenged, relating to the appellant's knowledge of and ability to construct a bomb, the testimony of the appellant on cross-examination amply demonstrated such knowledge and ability, which he had acquired, according to him, during service with the Marine Corps. At one point he said, "Sir, I could make a bomb if I had the implement, to blow up the whole block."

the appellant about Scott. She replied, "No, the only * * * ", at which point the State claimed surprise, asked that she be declared a hostile witness and requested permission to cross-examine her. The court said, "I think it is apparent she is either very forgetful or reluctant or something is wrong. I will permit you to cross-examine her." The appellant contends on appeal that these remarks by the court constituted prejudicial error. But he made no objection to them at the time, made no motion to strike them nor did he request that a mistrial be declared. Prior to the remarks by the court the State had claimed surprise out of the presence of the jury and brought the contents of the statement made by her to the police to the attention of the court at which time the court stated that the witness was either reluctant or unwilling to testify. We think that the record was sufficient to show that the State was surprised by the testimony of the witness and that the court did not abuse its discretion in allowing the State to cross-examine her. See Green v. State, 243 Md. 154, 220 A.2d 544; Sellman v. State, 232 Md. 344, 192 A.2d 788; Bruce v. State, 218 Md. 87, 145 A.2d 428; Meyerson v. State, 181 Md. 105, 28 A.2d 833. We do not think that Elmer v. State, 239 Md. 1, 209 A.2d 776, relied on by the appellant is apposite. In *Elmer* the State was not taken by surprise but asked the court to declare the witness to be a hostile witness and the court did so in the presence of the jury. We cannot say in the circumstances here that the remarks of the court prejudiced the appellant's right to a fair and impartial trial so as to require reversal of the judgment in the absence of objection.

IV

[5] The appellant called the Sheriff of Prince George's County to testify on his behalf and adduced evidence that the appellant was working with the Sheriff "in obtaining evidence against Mr. John Scott" and had obtained such evidence. On Cross-examination the State's Attorney asked

the witness, "Do you have in your budget an assassination fund?" Objection was made to the question and sustained. The appellant contends that the asking of the question was prejudicial error. We do not agree. The appellant's objection to the question was sustained and there was no motion for a mistrial. Therefore, under Maryland Rule 1085 there is nothing for this Court to review. Halstead v. State, 4 Md.App. 121, 241 A.2d 439. In any event we will not assume prejudice to the appellant and he has not shown that he was prejudiced in the circumstances. Charles v. State, 1 Md.App. 222, 228 A.2d 620; Borman v. State, 1 Md.App. 276, 229 A.2d 440.

V

[6, 7] On direct examination by the State a detective sergeant testified that he and another police officer participated in the investigation of the crime of which the appellant was being tried. He said that he had visited the Candey Hardware Store, had obtained price tags from a bin in which pipe was stored and delivered them to the F.B.I. He also obtained rolls of wire at the Shanty Restaurant and delivered them to the F.B.I. He identified the evidence. On cross-examination he was asked, "Weren't you investigating John Scott also, for having got this bomb?" Objection to the question was sustained. Objection to the further question, "Who did you have under investigation on the 22nd or 23rd for setting this bomb?" was also sustained as "it exceeds the scope." Out of the presence of the jury the court again said that the question exceeded the scope of cross-examination and defense counsel said that he would call the officer as a hostile witness and the court agreed that he could call him as a witness later. The officer was not called by the defense. The appellant contends that the court "unduly limited the defendant's scope of cross-examination." We find no error in the trial court limiting the question on cross-examination to the subject matter covered in the direct testimony of the witness. Ordinarily the scope of

cross-examination is a matter within the sound discretion of the trial judge and we cannot say that in this instance the restriction imposed was unsound or prejudicial. Davis v. State, 1 Md.App. 581, 232 A.2d 535. Further, the appellant failed to call the witness as his own and thus is precluded from presenting the issue. Holt v. State, 3 Md.App. 544, 549, 240 A.2d 355.

VI

[8] The appellant objected to the introduction in evidence of the various elements of the bomb on the ground that the State failed to show that they were the same items recovered at the scene of the offense. The record shows that when the army personnel removed the bomb parts from Scott's automobile they were turned over to Detective Sergeant Duncan who transmitted them to F.B.I. Agent Smith. The articles were received back from the F.B.I. and retained by Duncan until introduced in evidence. There was no change, deletion or alteration in the articles. The appellant claims that the chain of custody was broken when the articles were in the possession of the F.B.I. because other agents than those who examined them may have had access to them. Where the inquiry is into the chain of custody "the question is one of reasonable probability that no tampering occurred." Breeding v. State, 220 Md. 193, 151 A.2d 743. There was testimony here that no changes were made in the challenged articles except as necessary to test their composition. We find no merit in the contention.

VII

[9] The appellant contends that the trial court "so badgered and belittle defense counsel during trial as to prejudice the jury against the defendant." The trial consumed four days and produced a transcript of 548 pages. He cites two instances in which defense counsel was refused permission to approach the bench, three instances of "belittling remarks" by the court and two instances in

which the court attempted to expedite the trial, the last of which, however, occurred out of the presence of the jury. During the trial counsel was allowed to approach the bench on a number of occasions and we find nothing improper in the refusal to allow him to do so in the two instances stated. We have carefully reviewed the transcript and find nothing to indicate that the trial court was other than impartial or even that it was unduly impatient or brusque. See Bryant v. State, 207 Md. 565, 115 A.2d 502. The record does not show that the actions and statements of the trial court prejudiced the jury against the appellant so as to deprive him of a fair and impartial trial. Nor was any objection made at the trial to the remarks and actions of the court of which the appellant now complains. Md. Rules, 1085; Day v. State, 2 Md.App. 334, 341, 234 A.2d 770.

VIII

It took four days to conclude the evidence in the case. After the jury had been deliberating its verdict for seven hours the lower court, on its own motion, had them returned and asked the Foreman "if you are making any progress at all." The Foreman said, "We can report progress." The court said, over objection timely made:

> "Well, I have no desire to rush you into anything, but as you know, this case has been going on for four days now and ultimately it is going to have to be decided. If it can't be decided by you then another jury is going to have to decide it.
>
> The Court instructs you that you are instructed there are many cases in which absolute certainty cannot be expected, although the verdict must be the verdict of each individual juror as the result of his own convictions and not a mere acquiescence in the conclusion of his fellows. Each one of you should examine the questions submitted with candor and with the proper regard in deference to the opinions of others. It is your duty to decide the case, if you can conscientiously do so.

> And you should listen with a disposition to be convinced to each other's arguments, if your views are contrary to those of the vast majority. You should consider whether your views, which make no impression on the minds of so many, equally intelligent jurors, are correct.
>
> So, in light of these additional instructions, you will return to the jury room and deliberate further to this matter at this time."

The appellant contends that the court erred in giving the additional charge.

[10, 11] With the exception of the first paragraph, the instructions given by the court constitute the "Allen charge," so called because it was approved by the Supreme Court in Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528. Its propriety has been established in Maryland in both civil and criminal cases. Leupen v. Lackey, 248 Md. 19, 234 A.2d 573; Stewart v. State, Md.App., 244 A.2d 452 filed 23 July 1968.[3] In *Leupen* the Court warned, 248 Md. at 25, 234 A.2d at 576:

> "It must not be supposed that an Allen charge is proper in every case. There well may be facts and circumstances in a given case which would make such a charge either inadvisable or require the trial judge to exercise great care and restraint in presenting it to the jury."

Considering the length of the trial and the length of time the jury had been deliberating, we cannot say that the

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[3] *Allen* was decided 7 December 1896. In more recent times it has been subject to some criticism on the basis that it provides too great a possibility of a minority of the jury being in effect coerced by the court to abandon their view. See, State v. Randall, 137 Mont. 534, 353 P.2d 1054, 100 A.L.R.2d 171 (1960); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959); note, 53 Va.L.Rev. 123 (1967); note, 31 U.Chi.L.Rev. 386 (1964).

actual charge was improper in the instant case. But there remains the consideration of whether the remarks of the trial court immediately preceding the actual charge were proper. In *Leupen* the court stated, 248 Md. at p. 25, 234 A.2d 573, that it would be well for the lower court in any case to keep in mind the language found in 1 Branson's Instructions to Juries (3rd Ed. A. Reid 1960 Replacement) and it quoted:

> "The trial judge may advise an unagreed jury of the importance of their reaching a verdict, if they can do so without surrendering their conscientious convictions. But he cannot go beyond that and say anything to the prejudice of either party. There is no prescribed language that he must use in this connection. What he may with propriety say must in a large measure be left to his good judgment. But as the exclusive right to agree or not to agree rests with the jury, the judge must not by threat or entreaty attempt to coerce a verdict or to exert his authority to force an agreement; nor must he under any circumstances or in any manner indicate the character of verdict that the jury should return.
>
> While there must be nothing in the conduct of the trial judge toward the jury savoring of undue pressure or coercion to reach a verdict, when the jury return into the court and announce their failure to agree, the court may impress upon them the importance of agreeing, urge them to listen to argument and sacrifice the pride of personal opinion, and he may send them back for further deliberation until such time as it becomes apparent that hope of an agreement is futile." Id. at 149-150.

So such language as the jury has "got to reach a verdict"[4] and "this court expects a verdict"[5] has been held to savor of coercion or undue pressure.[6] In the instant case, considering the language employed in the actual charge, we do not think that the introductory remarks of the court were to the prejudice of the appellant and we do not construe them as an attempt to coerce a verdict, to force an agreement, or as an indication of the character of verdict that the jury should return. We find no error requiring reversal with respect to the additional charge.

IX and X

[12-14] The appellant contends that the conviction "was contrary to and against the weight of the evidence." This Court does not inquire into and measure the weight of the evidence in jury trials, Thompson v. State, 4 Md.App. 31, 240 A.2d 780, or in non-jury trials, Trout v. State, 3 Md.App. 259, 238 A.2d 281. And in jury trials this Court will not review the sufficiency of the evidence in the absence of a motion for judgment of acquittal. Culver v. State, 1 Md.App. 406, 230 A.2d 361; Quinn v. State, 1 Md.App. 373, 230 A.2d 368. At the close of the evidence offered by the State, the appellant moved for judgment of acquittal which was denied. He then offered evidence and by so doing withdrew that motion. Md.Rules, 755 b. The record does not disclose that a motion for judgment of acquittal was made at the close of all the evidence. Therefore the question of the sufficiency of the evidence is not before us. Jason v. State, 1

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[4]Jenkins v. United States, 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957.

[5]Orr v. State, 40 Ala.App. 45, 111 So.2d 627 (1958).

[6]See also United States v. Harris, 391 F.2d 348 (6th Cir.), March 8, 1968, 2 Cr.L.Reptr. 2506; Powell v. United States, 297 F.2d 318 (5th Cir. 1962); United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).

Md.App. 136, 228 A.2d 485. In any event the test in reviewing the sufficiency of the evidence in a jury case when the question is properly preserved is whether any relevant evidence which could have sustained the conviction was given to the jury. Tillery v. State, 3 Md.App. 142, 238 A.2d 125. We think that the evidence here met this test.[7]

Judgment affirmed.

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[7]The original appeal noted by the appellant was dismissed by order of this Court on 31 August 1967 upon motion by the State under Md.Rule 1035 b (4). The appeal here decided was granted by order of 27 September 1967 of the Circuit Court for Prince George's County as a belated appeal under post conviction procedures.

Appendix B

ORDER OF THE COURT OF APPEALS OF MARYLAND, DENYING CERTIORARI

WILLIAM PAUL PLUMLEY

v.

STATE OF MARYLAND

IN THE
COURT OF APPEALS
OF
MARYLAND

Misc. Docket No. 149

September Term, 1968

(No. 251—September Term, 1967
Court of Special Appeals)

* * * * * *

O R D E R

Under consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ Hall Hammond
Chief Judge

Date: February 4th, 1969.

Appendix C

INSTRUCTIONS, MARCH 21, 1966

THE COURT: Now do you want instructions?

MR. BAGLEY: Yes.

THE COURT: By the Court?

MR. BAGLEY: Yes. I have a list of instructions that I prepared for the Court's consideration.

THE COURT: You all come in the chambers then and we will go over them.

(Whereupon, counsel returned to the trial tables and the following proceedings were had in open court in the hearing of the jury:)

THE COURT: Very well, members of the jury, you will retire to the jury room while the Court goes over the instructions.

Court will recess for ten minutes.

(Whereupon, the jury retired to the jury room.)

(Whereupon, a short recess was taken.)

THE COURT: Very well, Mr. Bailiff, return the jury.

(Whereupon, the jury returned to the courtroom.)

THE COURT: Very well, Mr. Foreman and members of the jury:

The Court will now give you some instructions in this case. This is the case of State of Maryland against William Paul Plumley, wherein the Grand Jurors of the State of Maryland have indicted the Defendant, in these words:

"–at Prince George's County aforesaid, feloniously, wilfully and of his deliberately premeditated malice aforethought, did attempt to murder John Preston Scott –"

That is the crime of attempted murder. Now at the outset you will bear in mind anything the Court tells you in this case, whether it be by way of law or fact, is entirely advisory, not binding upon you, since you are the sole determiner of both the law and the facts under the Maryland Constitution.

The Court's function is merely to pass upon the propriety of the evidence offered. Of course, you must consider the evidence that the Court permits into evidence but what weight you give it is entirely your function, not the function of the Court.

So what I say to you, even though I read from a law book as to what the law is on a particular thing, you will bear in mind it is merely advisory, not binding upon you.

It is only an attempt to clarify the issues that we even go into it at all.

Now attempted murder, in order for you to make a determination as to the type of offense, you must of course understand what murder is, in the first degree, because it must be an attempt to murder.

Now murder in he first degree is defined as you must, in order to find that there exists murder in the first degree, you, as a jury, from the evidence, must find the actual intent, intent upon the part of the Defendant, the fully formed purpose to kill, with enough time for deliberation and premeditation, to convince the purpose is not the immediate offspring of rashness and impetuous temper and the mind has become conscious of its own design.

Now in that connection, for a homicide to be wilful, there must be a specific purpose in design to kill. To be deliberate there must be a full and conscious knowledge of the purpose to kill. To be premeditated the design to kill must have preceded the killing by an appreciable length of time, that is time enough to be deliberate.

In the case of murder in the first degree, the burden is on the State to show the killing was wilful, deliberate and premeditated. Those three essential elements. It must be wilful taking of the life, it must be deliberate, and it must be premeditated. Now that is for the crime of homicide. The Defendant is not charged with homicide. He is charged with attempted homicide. But before you could determine whether he is guilty of attempted homicide, you must, or course, know what the crime is.

Now I will give you the definition of the crime of attempted murder.

In general terms, an attempted to do or commit homicide is any overt act done with intent to kill in which except for the interference of some cause preventing the carrying out of the intent would have resulted in the commission of a homicide.

It consists of an intent to commit the crime and a direct ineffectual act done towards its commission. A mere declaration of intention to commit a homicide, unaccompanied by any act done in execution thereof, does not attempt, does not constitute an attempt within the meaning of the criminal law, nor is preparation alone sufficient to constitute an attempt. The act must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation.

It must stand either as the first or some subsequent step in a direct movement toward the commission of the offense, subsequent to the making of the preparation.

When, however, the design to commit homicide is clearly shown, slight acts done in furtherance of this design will consummate an attempt.

There must be an intention formed, purpose possibily and intentional with premeditation to take the life of another and preparation to bring it about and then some overt act done by the Defendant to bring about this

consummation of a deliberate design to take the life of another and there must be deliberation. All must precede the overt act which the State contends in this case was the overt act, the placing of the bomb itself into the car of the complainant by the Defendant.

Now this case is built upon what is known in the law as circumstantial evidence. Of course that is admissible evidence, the same as actual observation, primary evidence, but you must weigh it in connection with the type of case that is before you and it being circumstantial evidence you are put to the same test as though it were original observation evidence, that is somebody seeing somebody do something.

Whatever the type of evidence it is, be it original observation evidence or circumstantial evidence, the burden is upon the Government's shoulders to prove to you beyond a reasonable doubt all of the elements of the crime. That is each and every element of the crime.

That is, this Defendant, with premeditation and deliberation set about to kill the person of Mr. Scott. And he did an act to bring it about. But it was prevented by the intervening of some, either the wire coming loose or something like that. But there was an intention at that time to take the life, but the Government must prove to you beyond a reasonable doubt all of those elements before you would be justified in returning the verdict of guilty.

The Defendant, when he walked into this courtroom, walked in with a presumption of innocence. That presumption remains with him throughout the trial of this case and until you go back into the jury room he is presumed to be an innocent man and the Government must overcome the presumption by proving to you that quality of evidence that carries conviction to your mind to the extent that he is in fact guilty beyond a reasonable doubt.

That is the test.

Now I have attempted to give you the elements of the attempted murder, and the burden of proof.

Gentlemen, are there any exceptions or suggestions for further clarification of these instructions?

MR. CAMUS: None by the State.

MR. BAGLEY: May we approach the bench, Your Honor, on one?

THE COURT: Yes.

(Whereupon, counsel approached the bench and the following proceedings were had out of the hearing of the jury:)

MR. BAGLEY: I think it was No. 5 I had typed up that I asked about the hypothesis of innocence on circumstantial evidence on instructions.

THE COURT: The what?

MR. BAGLEY: The number that I have prepared.

THE COURT: I don't believe I saw that one.

Kevin, go in there and get—that is all right. He has a copy.

We discussed this.

MR. BAGLEY: As to reasonable doubt, Your Honor, but I think I would like the Court to go further specifically with this point of law as to the two conclusions that can be drawn. One as to innocence and one as to guilt. That was requested in the instructions there.

THE COURT: I don't believe it is harmful.

MR. CAMUS: I think you are out of context if the Court instructs every reasonable hypothesis on circumstantial evidence must be weighed or viewed in the duration of innocence of the Defendant. This is in Tosca v. State it does not say this. Tosca says every farfetched hypothesis does not have to be overcome. It is a matter of common sense. 208 Md.

MR. BAGLEY: I think it is cited in the Code as well.

THE COURT: Off the record.

(Discussion off the record.)

(Whereupon, counsel returned to the trial tables and the following proceedings were had in open court in the hearing of the jury:)

THE COURT: Very well, members of the jury, the Court wishes to add to its instructions in this extent:

Every criminal case evidence, to meet the test of legal sufficiency, must show directly or support a rational inference of the fact required to be proved and the facts must be established or the inference supported beyond a reasonable doubt or to a moral certainty or a reasonable doubt of an opposite fact must be created and when guilt is based solely on circumstantial evidence the circumstances taken together must be inconsistent with or such as to exclude every reasonable hypothesis or theory of innocence.

Very well, gentlemen, we will hear your arguments.

MR. BAGLEY: No exception, Your Honor.

THE COURT: Very well.

(Whereupon, counsel presented their arguments to the jury.)

THE COURT: Very well, Mr. Foreman, you may take any of these exhibits the members of the jury would like to see if you want to.

Mr. Alternate juror, you are relieved at this time. That is, you will not retire to the jury room. You get a day off.

Swear the Bailiff.

(Whereupon, the Bailiff was duly sworn and the jury retired under his charge.)

THE COURT: The Court will stand recessed until the jury returns.

(Whereupon, at 4:30 o'clock p.m. Court was recessed until the jury returns.)

(Whereupon, at 11:38 o'clock p.m. the following proceedings were had out of the hearing and presence of the jury:)

MR. BAGLEY: At this time, Your Honor, I would like to know for the purposes of the record, does the Court intend to give them the Allen instructions?

THE COURT: Yes.

MR. BAGLEY: For the purpose of the record, I will object to the instructions being given to them.

THE COURT: Very well.

MR. CAMUS: On the record, it is noticed the time the Court is doing this?

THE COURT: Seven hours after they got it.

Return the jury.

(Whereupon, the jury returned to their seats in the jury box.)

THE COURT: Mr. Foreman, the Court observes that you have been out with this case for seven hours. And we want to know if you are making any progress at all.

THE FOREMAN: We can report progress.

THE COURT: Well, I have no desire to rush you into anything, but as you know, this case has been going on for four days now and ultimately it is going to have to be decided. If it can't be decided by you then another jury is going to have to decide it.

The court instructs you that you are instructed there are many cases in which absolute certainty cannot be expected, although the verdict must be the verdict of each individual juror as the result of his own convictions and not a mere acquiescence in the conclusion of his fellows. Each one of you should examine the questions submitted

with candor and with the proper regard in deference to the opinions of others. It is your duty to decide the case, if you can conscientiously do so.

And you should listen with a disposition to be convinced to each other's arguments, if your views are contrary to those of the vast majority. You should consider whether your views, which make no impression on the minds of so many, equally intelligent jurors, are correct.

So, in light of these additional instructions, you will return to the jury room and deliberate further to this matter at this time.

The Court stands recessed until the jury returns.

(Whereupon, at 11:43 o'clock p.m. the jury returned to the jury room to continue deliberations.)

(Whereupon, at 11:43 o'clock p.m. Court was recessed until the jury returned.)

(Whereupon, at 1:00 o'clock, a.m., March 22, 1966, the jury returned to their seats in the jury box and rendered the following verdict: "Guilty," after which the jury was discharged from further consideration of the case.)

(Whereupon, Court was adjourned at 1:08 o'clock, a.m.)

Appendix D

ARTICLE 27, SEC. 645A, ANNOTATED CODE OF MARYLAND

POST CONVICTION PROCEDURE

645A. Right of appeal of convicted persons.

(a) *Right to institute proceeding to set aside or correct sentence.*—Any person convicted of a crime and either incarcerated under sentence of death or imprisonment or on parole or probation, including any person confined or on parole or probation as a result of a proceeding before a trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) or a proceeding under Article 31B of the Code, title "Defective Delinquents," who claims that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court or trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) was without jurisdiction to impose the sentence, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error which would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, may institute a proceeding under this subtitle to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction.

(b) *When allegation of error deemed to be finally litigated.*—For the purposes of this subtitle, an allegation of error shall be deemed to be finally litigated when the

Court of Appeals or Court of Special Appeals has rendered a decision on the merits thereof, either upon direct appeal or upon any consideration of an application for leave to appeal filed pursuant to 645-I of this subtitle; or when a court of original jurisdiction, after a full and fair hearing, has rendered a decision on the merits thereof upon a petition for a writ of habeas corpus or a writ of error coram nobis, unless said decision upon the merits of such petition is clearly erroneous.

(c) *When allegation of error deemed to have been waived.*—For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon the petitioner.

When an allegation of error could have been made by a petitioner before trial, at trial, or direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, but was not in fact so made, there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

(d) *Decision that Constitution imposes standard not theretofore recognized.*—For the purposes of this subtitle and notwithstanding any other provision hereof, no allegation of error shall be deemed to have been finally litigated or waived where, subsequent to any decision upon the merits thereof or subsequent to any proceeding in which

said allegation otherwise may have been waived, any court whose decisions are binding upon the lower courts of this State holds that the Constitution of the United States or of Maryland imposes upon State criminal proceedings a procedural or substantive standard not theretofore recognized, which such standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.

(e) *Not substitute for remedies incident to trial proceedings; time of filing petition for relief; other common-law and statutory remedies superseded.*—The remedy herein provided is not a substitute for, nor does it affect any remedies which are incident to the proceedings in the trial court or before the trial magistrate (including a judge of the Municipal Court of Baltimore City or of the people's court of any county) or any remedy of direct review of the sentence or conviction. A petition for relief under this subtitle may be filed at any time. No appeals to the Court of Appeals of Maryland or the Court of Special Appeals in habeas corpus or coram nobis cases, or from other common-law or statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958, shall be processed in due course. Provided, however, that nothing in this subtitle shall operate to bar an appeal to the Court of Appeals (1) in a habeas corpus proceeding instituted under 25 of Article 41 of this Code or (2) in any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of a crime or sentence of death or imprisonment therefor, including confinement as a result of a proceeding under Article 31B of this Code. (1958, ch. 44; 1959, ch. 429; 1965, ch. 442, 1; 1966, ch. 12, 4.)

Appendix E

ARTICLE 5, SEC. 21A, ANNOTATED CODE OF MARYLAND

21A. Review of decisions of Court of Special Appeals.

In any criminal case, post conviction or defective delinquent proceeding in which a decision has been rendered by the Court of Special Appeals upon appeal from the circuit court of any county, the Criminal Court of Baltimore, or one of the law courts of Baltimore City if it shall be made to appear to the Court of Appeals upon petition of any party, whether a defendant or the State, that a review is desirable and in the public interest, the Court of Appeals shall require, by certiorari or otherwise, any such case to be certified to the Court of Appeals for its review and determination, except no such petition shall be entertained by the Court of Appeals from the denying or granting by the Court of Special Appeals of an application for leave to prosecute an appeal in post conviction and defective delinquent proceedings and from the denying or granting by the Court of Special Appeals of a petition for review filed under 21 of this article. (1966, ch.12, 1.)

Appendix F

SECS. 14A, 14B, 15, 16, and 18, CONSTITUTION OF MARYLAND

Section 14A. Creation of intermediate courts of appeal? prescribing jurisdiction and powers.

The General Assembly may by law create such intermediate courts of appeal, as may be necessary. The General Assembly may prescribe the intermediate appellate jurisdiction of these courts of appeal, and all other powers necessary for the operation of such courts. (1966, ch.10, ratified Nov. 8, 1966.)

Section 14B. Eligibility of member of General Assembly for appointment as judge of intermediate court of appeal.

No member of the General Assembly at which the addition of Section 14A was proposed, if otherwise qualified, shall be ineligible for appointment or election as a judge of any intermediate court of appeal, established by law by the General Assembly pursuant to said Section 14A, by reason of his membership in such General Assembly. (1966, ch 10, ratified Nov. 8, 1966.)

Section 15. Judge who heard cause below disqualified; opinions to be filed; judgment of Court of Appeals final.

Any judge of the Court of Appeals or of an intermediate court of appeal who heard the cause below either as a trial judge or as a judge of any intermediate court of appeal as the case may be shall not participate in the decision. In every case an apinion, in writing, shall be filed within three months after the argument, or submission of the cause; and the judgment of the Court of Appeals shall be final on conclusive. (1956, ch. 99, ratified Nov. 6, 1956; 1966, ch. 10, ratified Nov. 8, 1966.)

Section 16. Reports.

Provision shall be made by Law for publishing Reports of all causes, argued and determined in the Court of Appeals and in the intermediate courts of appeal, which the judges thereof, respectively, shall designate as proper for publication. (1966, ch. 10, ratified Nov. 8, 1966.)

Section 18. Judges of Court of Appeals to make rules, etc., for prosecution of appeals and governing proceedings and practice in courts of equity.

It shall be the duty of the Judges of the Court of Appeals to make and publish rules and regulations for the prosecution of appeals to the appellate Courts whereby they shall prescribe the periods within which appeals may be taken, what part or parts of the proceedings in the Court below shall constitute the record on appeal, and the manner in which such appeals shall be brought to hearing or determination, and shall regulate, generally, the practice of said Court of Appeals and any intermediate courts of appeal so as to prevent delays, and promote brevity in all records and proceedings brought into said Courts, and to abolish and avoid all unnecessary costs and expenses in the prosecution of appeals therein; and the said judges shall make such reduction in the fees and expenses of the said Courts as they may deem advisable. It shall also be the duty of said Judges of the Court of Appeals to devise, and promulgate by rules, or orders, forms and modes of framing and filing bills, answers, and other proceedings and pleadings in Equity; and also forms and modes of taking and obtaining evidence, to be used in Equity cases; and to revise and regulate, generally, the practice in the Courts of Equity of this State, so as to prevent delays, and to promote brevity and conciseness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses attending the same. And all rules and regulations thereby directed to be made, shall, when made, have the force of Law, until rescinded, changed, or modified by the said Judges, or the General Assembly.

(1956, ch. 99, ratified Nov. 6, 1956; 1966, ch. 10, ratified Nov. 8, 1966.)

Section 18A. Powers and duties of Chief Judge of Court of Appeals; assignment of judges; rule-making power of Court of Appeals.

The Chief Judge of the Court of Appeals shall be the administrative head of the judicial system of the State. He shall from time to time require, from each of the judges of the Circuit Courts for the several counties and of the Supreme Bench of Baltimore City, and of any intermediate courts of appeal, reports as to the judicial work and business of each of the judges and teir respective courts. He may, in case of a vacancy or of the illness, disqualification or other absence of any judge of the Court of Appeals or of any intermediate court of appeal, or for the purpose of relieving an accumulation of business in any of said courts, designate and assign any judge of the Court of Appeals (if the assignment is to be made to an intermediate court of appeal), any judge of any intermediate court of appeal (other than that to which the assignment is to be made), any judge of any of the Circuit Courts for the counties, or any judge of the Supreme Bench of Baltimore City to sit in any case or cases or for the specified period as a judge of the Court of Appeals or of any intermediate court of appeal (as the case may be) in lieu of a judge of such Court. The Chief Judge of the Court of Appeals also may designate and assign, to sit as a judge of the Circuit Court for any county or the Supreme Bench of Baltimore City and of any other Court or Courts of Baltimore City which may be held by a judge of said Supreme Bench, either alone or with one or more other judges, in any case or cases or for a specified period, any judge of the Court of Appeals or of any intermediate court of appeal or of any other Circuit Court or of the Supreme Bench of Baltimore City. Any judge designated and assigned by the Chief Judge of the Court of Appeals pursuant to this section shall have

all the power and authority pertaining to a judge of the Court to which he is so assigned; and his power and authority shall continue with respect to all cases (including any motions or other matters incidental thereto) which may come before him by virtue of such designation and assignment until his action thereon shall be completed. In the absence of the Chief Judge of the Court of Appeals the provisions of this section shall be applicable to the senior judge present in said Court of Appeals. The powers of the Chief Judge under the aforegoing provisions of this section shal be subject to such rules and regulations, if any, as the Court of Appeals may make. The Court of Appeals from time to time shall make rules and regulations to revise the practice and procedure in the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of the courts other than the Court of Appeals to make rules of practice and procedure shall be subject to the rules and regulations prescribed by the Court of Appeals or otherwise by law. (1943, ch. 772, ratified Nov. 7, 1944; 1966, ch. 10, ratified Nov. 8, 1966.)